years of jurisprudential evolution and case law to support it. The Reynolds compromise says if there is reasonable danger then we secure the information. S. 417 says if it is reasonably likely, you can compromise the information. S. 417 fails to protect state secrets.

This state secrets privilege is never lightly used and never used with impunity. The assertion of this right must be made in writing by the head of the executive agency invoking the state secrets privilege. In recent cases this has sometimes been the Director of National Intelligence. Courts may conduct their own probe to ensure that the privilege has been invoke correctly. This probe will include an examination as to why the information being sought is needed to prove a plaintiff's case. Conversely, courts will examine as to why the information is critical to national security. After thoughtful review, a judge makes the determination on the production of evidence alleged to have been covered by the privilege. Not a law passed by politicians.

There is a myth that the Bush administration invoked the state secrets privilege more than any other previous administration. Rooted in this fallacy is the idea that the administration overreached in asserting the privilege to protect information not previously thought to be within its scope. This erroneous notion was propagated by not only the media, but by Members of this body. Most legal experts in the field of national security law have stated that it is not possible to collect accurate annual statistics for year-to-year comparisons. There is no ''batting average'' that can be empirically compared from one presidential administration to another.

To do so would incorrectly operate under the assumption that the government is presented with the same amount of cases each year in which the privilege can be asserted. It makes absolutely no sense to me to compare the administrations and judge them based on the total number of times they asserted the privilege.

The flow of litigation changes from year to year and varies from each administration, as does the invocation of the privilege. It varies because of the times and circumstances. We have been living in very difficult times and circumstances where we have to protect this country; circumstances we have never had to face before. Therefore, it is ludicrous that attempts to compare the rate of assertions of this privilege and arrive at the incorrect conclusion that because the Bush administration used this privilege it must be changed.

Unfortunately, for the authors of this bill, the data does not support the hypothesis that the Bush administration ever used the state secrets privilege in an attempt to dismiss complaints. Published opinions have revealed in the 1970s the government filed five motions. In the 1980s the government filed motions nine times. In the 1990s the government filed motions 13 times. Preliminary data available for the Bush administration indicate that the privilege was used 14 times.

Therefore, the impetus for the State Secrets Protection Act does not support the conclusion that the Bush administration blazed a new trial in national security law. On the contrary, the authors of this bill are the ones attempting to alter national security law. Keep in mind, we have been going through an extended war on terrorism, and, frankly, there is a need to protect national security. That is why we have the state secrets law.

In the first 100 days of the Obama administration—get that now—in the first 100 days of the Obama administration, the Department of Justice has invoked this privilege three times—in the first 100 days. This is the administration that was complaining about this. Now they found, when they faced reality and how important this privilege is, they changed their tune, and they should. I commend the administration and specifically the President for recognizing this.

The administration has picked up where the Bush administration left off in three pending cases: Al Haramain Islamic Foundation v. Obama, Mohammed v. Jepperson Data Plan, and Jewell v. NSA. During an interview of a widely revered liberal journalist, Attorney General Eric Holder stated that in his opinion the Bush administration—get this word—''correctly'' applied the state secrets privilege in these cases.

If this legislation is passed in its present form, private attorneys would be given access to highly classified declarations before a judge rules on whether the state secrets privilege should prevent such a disclosure. Can you imagine the harm that could come to our country? It is hard to believe that anybody would be advocating this in the Senate with what we have been going through and the special wars that we have been going through and the special type of terrorists that we have been having to put up with.

This legislation—lousy legislation—will have the effect of incentivizing lawsuits by rewarding attorneys who file lawsuits with a security clearance. I remember one case in New York where the attorney herself was convicted because she was passing on information.

Now this clearance will grant these attorneys access to classified information that if divulged could reasonably harm our national security interests. It is bad enough trying to keep secrets around here, let alone with people who really should not be qualified for that type of classification. Does an attorney need absolute proof of some violation of law to file a lawsuit to learn details about classified programs? No, under this bill, they simply need to make an accusation. Any accusation will do.

Ensuring national security programs stay classified is critical to our citizens' continued safety. Under this legislation, private attorneys, regardless of the merits of their lawsuits, will be given access to our Nation's secrets, secrets that are critical to the protection of our country. It is not hard to see how this legislation could seriously harm national security.

It is hard for me to see why anybody would be arguing for this legislation. It is a legitimate concern that ideological attorneys would be willing to compromise national security interests and secrets and disclose classified information. There are at least two recent instances involving the disclosure of classified information. These are recent. I am just talking about the recent ones, and then only two of them. There may be more.

In May 2007, a Navy JAG lawyer leaked classified information pertaining to Guantanamo detainees to a human rights lawyer. I find it disturbing that a U.S. military officer who is sworn to protect this Nation would disseminate classified information. But an even more troubling scenario is posed by private attorneys. In 2005, a more alarming case came to light when a civilian defense counsel was convicted of providing material support for a terrorist conspiracy by smuggling messages from her client, a Muslim cleric convicted of terrorism, to his Islamic fundamentalist followers in Egypt.

Do you know how difficult it was to convict an Islamic fundamentalist religious leader? Yet this man was convicted, and rightly so. His attorney compromised these matters. In press interviews after the attorney was convicted, she said, ''I would do it again—it's the way lawyers are supposed to behave.''

She also said that ''you can't lock up the lawyers. You cannot tell the lawyers how to do their job.''

I am not implying that all lawyers would act so egregiously. What I am saying is there is a profound reason why the government has classifications for categorizing the sensitivity of information that is vital to national security. Providing top secret clearances to persons outside the employment of the United States is a colossal blunder. This bill will allow that.

The courts recognize the executive branch's superior knowledge on military, diplomatic, and national security matters. Judges do not relish the thought of second-guessing decisions made by officials who are better versed on matters that may be jeopardized by allowing attorneys access to classified materials. Similarly, Congress should not relish the thought of second-guessing the judgment of courts that have given careful consideration regarding the appropriate legal standards to balance the interests of judges and national security programs.

The State Securities Protection Act does not protect state secrets. This bill upsets the judicially developed balance between protection of national security and private litigants' access to secret